

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
DECEMBER SESSION, 1995

FILED

March 20, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

DARRELL LYNN WEST,)
)
Appellant)
)
vs.)
)
STATE OF TENNESSEE,)
)
Appellee)

No. 03C01-9402-CR-00075

KNOX COUNTY

Hon. RAY L. JENKINS, Judge

(Post-Conviction)

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Darrell Lynn West, appeals the dismissal of his petition for post-conviction relief without an evidentiary hearing. After reviewing the record, we affirm the judgment of the post-conviction court.

I. Factual Background

The appellant filed the instant petition on June 28, 1989. This is the appellant's second petition for post-conviction relief. He is currently incarcerated in the state penitentiary pursuant to 1987 convictions for armed robbery and habitual criminality. In his *pro se* petition, the appellant challenges the validity of the four felony convictions used to declare him an habitual criminal. The appellant pled guilty to all four felonies. He now contends that the trial judge who accepted his guilty pleas failed to advise him, as required by Boykin v. Alabama, 395 U.S. 238, 242-244, 89 S.Ct. 1709, 1712-1713 (1969), and State v. Mackey, 553 S.W.2d 337, 341 (Tenn. 1977), of his privilege against compulsory self-incrimination and his right to confront his accusers. Additionally, the appellant argues that he was not informed that the four convictions could be used against him in the future to enhance punishment for other crimes.

On August 11, 1989, the post-conviction court appointed counsel for the appellant. Subsequently, this attorney withdrew from the private practice of law and, on March 19, 1992, the post-conviction court appointed another attorney. Neither attorney submitted an amended petition. Finally, on September 16, 1993, the court found that the appellant's claims for relief had been previously determined and dismissed the petition. On October 18, 1993, a third attorney was appointed for the purpose of appeal.

The appellant's first petition for post-conviction relief was filed on October 7, 1987. Amendments were filed on October 30, 1987, and March 24, 1988. The amended petition included claims identical to those presented in the petition which is the subject of this appeal. Following an evidentiary hearing, the post-conviction court dismissed the appellant's petition. This court affirmed the dismissal. West v. State, No. 1214 (Tenn. Crim. App. at Knoxville), perm. to appeal denied, (Tenn. 1989).¹

II. Analysis

It is firmly established that a court can summarily dismiss a post-conviction petition without an evidentiary hearing if the grounds contained in the petition have been previously determined or waived. Caruthers v. State, 814 S.W.2d 64, 69-70 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1991); Sloan v. State, 477 S.W.2d 219, 220 (Tenn. Crim. App. 1971), perm. to appeal denied, (Tenn. 1972); Tenn. Code Ann. § 40-30-111 (1990)(repealed 1995) ("[t]he scope of the [post-conviction] hearing shall extend to all grounds the petitioner may have, except those grounds which the court finds should be excluded because they have been waived or previously determined"). It is undisputed that the claims in the petition before us were included in a prior petition, which was considered and rejected by the post-conviction court and this court.

Nevertheless, the appellant argues that he filed the instant petition *pro se* in order to toll the three year statute of limitations, intending that appointed counsel amend the petition and "raise several other constitutional issues." In

¹ Although all the claims in the instant petition were raised in the earlier petition, the only common issue raised on appeal from the dismissal of the first petition was the failure of the trial court to advise the appellant that the four convictions could be used against him to enhance punishment for later arising convictions. This claim was found to be without merit. Id.

essence, the appellant contends that the post-conviction court's dismissal of his *pro se* petition was premature. The court could only dismiss the petition following amendment by appointed counsel. In support of his argument, the appellant cites Tenn. Code Ann. § 40-30-109(a)(1)(1990)(repealed 1995), which authorized dismissal of a petition without an evidentiary hearing only when "the petition has been competently drafted and all pleadings, files and records of the case which are before the court conclusively show that the petitioner is entitled to no relief" (Emphasis added). See also Mayes v. State, 671 S.W.2d 857, 858 (Tenn. Crim. App. 1984)(Tenn. Code Ann. § 40-30-109(a) "requires the petition to be competently drafted"). This court has observed that, in making a determination under Tenn. Code Ann. § 40-30-109(a)(1), a post-conviction court should consider Tenn. Code Ann. § 40-30-107 (1990)(repealed 1995), which provided that no dismissal shall be ordered for defects in form or procedure until the appellant and appointed counsel have had a reasonable opportunity to amend, and Tenn. Code Ann. § 40-30-115(b) (1990)(repealed 1995), which similarly provided that the court "shall look to the substance rather than the form of the petition and no petition shall be dismissed for technical defects, incompleteness or lack of clarity" until the appellant has had reasonable opportunity, with the aid of counsel, to file amendments. Martucci v. State, 872 S.W.2d 947, 949 (Tenn. Crim. App. 1993). We noted in Martucci that the appointment of an attorney who fails to correct fatal defects in a petition setting forth a potentially meritorious constitutional claim will not suffice.² Id.

However, if there is "a lack of legal merit, appearing upon the face of the

² Therefore, although the State correctly notes that the appellant's petition does not comply with the requirements of 40-30-104(8) and (10) (1990)(repealed 1995), which sections mandated that the petition describe "all other applications for relief previously filed" and also state "[f]acts establishing the grounds on which the claim for relief is based, [and] whether they have been previously presented to any court ... ," the post-conviction court could not have summarily dismissed the appellant's petition on this basis if the petition had set forth a colorable claim for relief.

petition," then the post-conviction court may dismiss the petition without even permitting the appellant to confer with counsel. Burt v. State, 454 S.W.2d 182, 184 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1970). See also Allen v. State, 854 S.W.2d 873, 875-876 (Tenn. 1993); Swanson v. State, 749 S.W.2d 731, 734 (Tenn. 1988). In other words, "a clear but patently non-meritorious petition may be dismissed summarily," without the appointment of counsel, much less an evidentiary hearing. Martucci, 872 S.W.2d at 949; Cureton v. Tollett, 477 S.W.2d 233, 236 (Tenn. Crim. App. 1971), perm. to appeal denied, (Tenn. 1972). Certainly, therefore, in the absence of some valid theory of relief and following the appointment of counsel and an opportunity to amend the petition, the post-conviction court can summarily dismiss a petition, even though counsel has not amended the petition. Gable v. State, 836 S.W.2d 558, 560 (Tenn. 1992). See also State v. Higgins, 729 S.W.2d 288, 290 (Tenn. Crim. App. 1987) (we presumed, because counsel was appointed for the appellant, that counsel would have included any viable legal arguments in the post-conviction petition or in an amendment thereto).

Again, all issues raised by the appellant in his second petition had inarguably been previously determined. Nevertheless, at the appellant's request, the post-conviction court appointed counsel. Although this case remained pending before the post-conviction court for approximately four years, counsel did not amend the petition. The appellant, in his brief, concedes that appointed counsel did not amend the petition because counsel believed that all viable issues had been previously determined. Indeed, we note that three different attorneys have represented the appellant at various times during these post-conviction proceedings and none have suggested what "other constitutional issues" might be relevant to the appellant's case. The appellant has never suggested what the "other constitutional issues" might be. Finally, the record does not support any "other constitutional issues." There is no duty imposed

upon the post-conviction court "to search for some possible, speculative, constitutional challenge not raised in the petition."

Sowell v. State, 724 S.W.2d 374, 376 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1986).

For the reasons stated above, the judgment of the post-conviction court dismissing the appellant's petition is affirmed.

David G. Hayes, Judge

CONCUR:

William M. Barker, Judge

Jerry L. Smith, Judge